Transfer of Development Rights and Related Considerations

A Report to the Community Preservation Advisory Committee

Prepared for

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TRANSFER OF DEVELOPMENT RIGHTS AND RELATED CONSIDERATIONS TABLE OF CONTENTS

Introduction 1

TDR Overview 1

Definition 1
National Extent of TDR Programs 1
TDR Success Factors 2
Limitations of TDR Programs 3

Alternatives to TDR 4

Density Transfer Charges (DTC) 4
Open Space Impact Fees 6
Purchase of Development Rights 6

TDR Model 1 Density Transfer Charge 8

TDR Model 2 Suburbanizing Maine Town 10

TDR Model 3 Regional Multi-Jurisdictional TDR 12

TDR Model 4 Preservation of Highway Capacity 14

TDR Model 5 State Model – Transfer of Development Credits, State Highways 16

TDR and Affordable Housing 18

The National Experience 18
What is the Potential for Maine? 18
The Potential 18
The Challenges 19

Appendix – Summary of TDR Programs, Successful National Programs A-1

REPORT TO CPAC
TDR MODELS AND RELATED CONSIDERATIONS

Introduction

The State Planning Office contracted with a consultant team led by Rich Rothe of Rothe Associates and assisted by Brian Kent and Amanda Walker of Kent Associates, Charles Colgan, and a TDR Advisory Committee to research the viability of Transfer of Development Rights (TDR) programs in the State of Maine. The purpose of the research was to examine nationwide programs and prepare a number of models that might be used in Maine to guide growth to areas with existing or planned infrastructure, limit sprawl, and preserve open space. The research undertaken for this report included a review of the national literature, New England's experience with TDR programs, a comprehensive analysis contained in the book Beyond Takings and Givings,[1] and select interviews.

This report contains an overview of TDR, five models that might be implemented in Maine, and a discussion of the opportunities and challenges involved in using TDRs to promote affordable housing.

TDR Overview

Definition

In its simplest form, TDR is an implementation tool that encourages the voluntary shift of development from places that communities want to preserve, called sending areas, to places that communities have designated for growth, called receiving areas. In a TDR program, the owners of land in "sending areas" sell their development rights, thus restricting the future development of their properties. The development rights are purchased by developers who wish to build at greater densities in designated receiving areas, places that are designated for development; in essence "transferring" those rights from one area to another, hence the term transferable development rights or TDRs. Developers of property in receiving areas have the choice to either build at the density specified in local regulation or buy TDRs from properties in sending areas and build at a higher specified density. The cost of purchasing development rights is made profitable by the increased level of development, otherwise allowed by local zoning.

TDR has historically been used to preserve land in one or more sending areas in exchange for the right to build at higher densities in one or more receiving areas. Variations on this traditional approach may employ different incentives, such as allowing developers to exceed downtown building height limitations in exchange for preserving downtown historic properties.

National Extent of TDR Programs

The most recent inventory by Rick Pruetz[1] reveals that there are approximately 134 TDR programs (out of about 39,000 local jurisdictions). States with the most TDR programs are: California (29), Florida (17), Pennsylvania (15), Maryland (10), and Colorado (8). Maine has one (Cape Elizabeth). A second Maine program was eliminated in an amendment of the Town of

[1] Beyond Takings and Givings, Rick Pruetz, AICP, Arje Press, Marina Del Rey, California, 2003

Brunswick's Zoning Ordinance. A third program is currently being considered by the Town of New Gloucester. Some programs in other states are very successful, but most have not experienced a single transfer. The complexity of TDR programs and the difficulty of balancing all of the factors needed to make them work may account for their low success rate.

TDR Success Factors

Based on an examination of TDR programs in other states, there are a number of characteristics of successful TDR programs:

1. **Market conditions**. TDR is a market-driven, land management technique. It supports higher densities of development in one area while at the same time preserving undeveloped land in another. In order for it to work, there has to be substantial demand for some particularly desirable land use features, such as compact, residential or commercial development. Moreover, growth pressures must be strong enough to result in a demand for density that exceeds the limits imposed by local zoning. If there is no market demand for compact development, a local TDR program, however well-intentioned, will not be successful. If developers are content to comply with existing density, there will be no demand for the development rights provided through the TDR program.

   The major challenges to the potential success of TDRs in Maine are relatively low growth pressures compared to what is experienced in other parts of the country, and municipal regulations that restrict compact development. Growth pressures are generally greatest in Maine's suburbanizing communities, where most of the development is low density, single lot development. Successful TDR programs depend upon motivated developers who want, and who are allowed, to build projects that exceed local density requirements. The Maine housing market is dominated by small developers who build single homes or small subdivisions (3 to 15 units), unlike the much larger developers and developments typical in many other states. Very few programs require citizens to purchase TDRs prior to getting a building permit.

2. **Strong land use controls**. TDR programs must employ a strong system of local land use controls. Communities sometimes try to enhance the marketability of their TDR programs by increasing lot size requirements in sending areas (for example, up to 25 acres, while permitting TDRs to be sold at a rate of one per five acres). This may not be necessary, if the existing minimum lot size requirement of the sending or receiving area is already relatively large.

3. **Careful planning**. A TDR program requires careful planning, beginning with its inclusion in the local comprehensive plan. A TDR program requires the designation of sending and receiving areas. The community must establish a realistic allocation rate or transfer ratio (the number of TDRs that will be required to allow specific density increases in receiving areas). To be most successful, the transfer ratio must be based upon an understanding of land values and housing markets. The community must decide how it will enhance the sale of TDRs and how it will monitor and periodically adjust the TDR program to make it succeed. There may be a need to establish a TDR bank to facilitate the purchase and sale of TDRs, especially during periods of slow markets.

4. **Local support**. TDR programs have been most successful where there has been widespread public acceptance of the program which requires effective outreach and education of:

    - Sending area landowners (e.g. landowners who wish to preserve their land as open space or farmers who wish to keep their land in farming);
    - Developers and residents of receiving areas; and
    - The general public, based on a recognition that traditional land use controls have not controlled sprawl.

    Widespread opposition from either sending or receiving area landowners may preclude adoption of a TDR program or result in its repeal. If developers do not participate, the program will not be implemented. If receiving area residents register strong opposition to the increased density of a proposed development, developers may choose to avoid proposing additional projects in the same area.

Limitations of Traditional TDR Programs

A successful TDR program can be effective in promoting compact development while preserving open space. However, there are some challenges:

1. **Lack of suitable markets.** TDR programs will not work where there is limited development pressure or demand for compact development. Much of Maine appears to lack suitable markets for such development.

2. **Adoption Complexities.** TDR programs can be complicated and generally require a substantial public education effort. A number of important decisions have to be made simultaneously including the designation of sending and realistic allocation rates (the number of TDRs that will be required to allow specific density increases in receiving areas).

3. **Liquidity.** To work, TDRs must have liquid markets. That is, there must be a sufficient supply of development rights available not only to meet demand, but also to make sure that those who want to buy development rights have a choice of sellers so that monopoly pricing does not occur. To provide liquidity in the TDR markets, a bank is often created to hold development rights for sale. This has an impact on administrative costs.

4. **The takings issue.** Under the Fifth Amendment of the Constitution, made applicable to the states under the Fourteenth Amendment, the government is prohibited from taking private property for public use without "just compensation," and from depriving individuals of their private property without "due process of law." The establishment of large lot sizes or other development restrictions in sending areas has been challenged as a taking in several jurisdictions. To our knowledge, courts have not made a declarative decision to overturn or annul a TDR program as a partial or full taking. However, communities considering a TDR program should be aware of several important legal issues:

- Temporary takings may be compensable (thus, if a regulation denies all economically beneficial use of the property, and there is no market for the sale of TDRs at the time the TDR program goes into effect, a temporary taking may be deemed to occur);
- A number of recent cases may have opened the door to challenges to TDR programs on the grounds that while TDR may restore economic value to the property owner, they do not restore use of the restricted property itself;
- There may be little margin for error in setting up a TDR program when all use is denied and TDRs are the sole means of compensating landowners for development restrictions (no TDR market = no mitigation).
- If prices and ratios are not carefully established and periodically adjusted, a TDR program may result in some compensation to sending area landowners, but not "just compensation," possibly resulting in a partial taking.

5. **Administrative Costs.** There are administrative costs of a TDR program. For example, TDR programs require staff or an outside agency to approve and record deed restrictions, monitor sending sites for compliance with deed restrictions, approve and record documents extinguishing development rights, track TDRs, maintain lists of potential buyers and sellers, establish or adjust prices and ratios based on market values, and promote the use of TDRs. If a bank is established, there will also be costs associated with setup and operation.

6. **Permanence.** A TDR program generally requires that a deed restriction be recorded whenever a TDR right is purchased in a sending area. This could result in the permanent preservation of land that may be found later to be critical for development or for meeting future municipal needs.

7. **Fairness.** As with other regulatory or growth management tools, critics of TDR may argue that the strategy is unfair because it treats landowners in one area of a community or region differently than landowners in another community or region. Sending area landowners may argue that they are being unfairly treated if larger lot size requirements are imposed to enhance TDR marketability and preserve open space. In receiving areas, residents may argue that TDR unfairly increases the intensity of development to support preservation elsewhere in the community or region. The criticisms are not unlike those expressed about any system of zoning, which, by its basic definition, asserts that different areas are regulated in different ways for a greater overall public benefit.

Alternatives to TDR

There are several alternatives to TDR that may be just as effective as TDR, and may be better suited to conditions in Maine.

Density Transfer Charges

Explanation. A density transfer charge (DTC) allows developers to exceed pre-established density thresholds by paying a density transfer charge to the municipality. In a DTC program, the community does not have to designate sending and receiving areas ahead of time, although it may choose to do so by specifying those areas and rates by ordinance. The areas and rates are negotiated and contracted on a case-by-case basis or through a pre-established ordinance provision, based on the capacity of existing or planned infrastructure and phasing of the development and the overall acceptable density of development in the area. The community is normally obligated to use proceeds from the charges to acquire land, development rights, or easements to preserve designated areas from future development. In exchange for the proceeds, the developer would be allowed to exceed the pre-established density.

The town might choose to use the funds to purchase land, development rights, or easements in rural, or critical rural areas, identified in its comprehensive plan or a more detailed open space plan. It might also seek to use the funds to leverage other funds (Land for Maine's Future, local or regional land trusts, or private donations) to acquire these properties, development rights, or easements.

Berthoud, Colorado (population 4,800) charges a density transfer fee that applies to additional housing units permitted as a result of rezoning undertaken at the request of a developer. The fee is $3,000 per single-family dwelling, and $1,500 per multi-family dwelling. As of 2002, the town has approved three subdivisions, with a total of 313 dwellings subject to payment.

The DTC is essentially a TDR program with one buyer and one seller of development rights (the town).

Advantages

- It is a fairly simple program to understand, adopt and administer;
- Open space preservation is funded by development proceeds rather than tax dollars;
- It directs growth to designated growth areas where infrastructure already exists or is planned;
- Depending on how the charge is established, it can avoid controversies that can arise from designating sending and/or receiving areas;
- The fee is strictly voluntary. Developers can build at current density requirements without the fee;
- It is more flexible than TDR; and
- The community can direct preservation efforts to specific parcels (in a free market TDR program without a TDR bank, the developer chooses where to purchase development rights within the receiving area).

Disadvantages

- The rezoning process can be contentious (neighbors may object to increased density thresholds on either a case-by-case basis or as part of adoption of a ordinance that establishes appropriate areas and charges);
- Development charges may not generate adequate revenue to acquire land, development rights, or easements elsewhere in the community or region;
- If done on a case-by-case basis, rather than as part of an ordinance provision, the charges may be challenged as arbitrary or inequitable, if different rates are negotiated for different developments. If rates are too high, the community might be challenged for exercising

monopolistic authority. In addition, the incentive offered the developer may not be enough to overcome the risk of unspecified cost or time to conclude negotiations.

Open Space Impact Fees

Explanation. Open space impact fees can be imposed on all building projects in a community with the proceeds earmarked for the acquisition and/or preservation of open space.

Advantages

- Open space preservation is funded by development proceeds rather than tax dollars;
- Open space impact fees may be easier to administer than a TDR program;
- Open space impact fees may be easier to adopt than land use restrictions or increased densities;
- The community can control where the money is spent; there is no designation of sending and receiving areas (in a free market TDR program without a TDR bank, the developer chooses where to purchase development rights within the sending area).

Disadvantages

- Open space impact fees must be supported in the town's comprehensive plan and must be based on a methodology that establishes a rational and defensible apportionment of the cost of acquiring or preserving open space;
- Open space impact fees may have to compete with the need to raise fees for other services;
- Open space impact fees involve the acquisition of development rights or easements, the recording of deed restrictions and the enforcement of easements where appropriate, all of which are characteristic administrative costs associated with TDR programs. In addition, open space impact fees have their own administrative, financial, and legal requirements.
- Open space impact fees do nothing to increase the compactness of development in designated growth areas.

Purchase of Development Rights

Explanation. The purchase of development rights (PDR) is similar to TDR in that development rights are purchased on a voluntary basis from rural area landowners. PDR differs from TDR in that funds are used to purchase development rights without a corresponding increase in density in receiving areas (in fact, there are no receiving areas). PDRs can also be thought of as DTCs without a dedicated revenue source.

Advantages

- As in the prior two examples the community can control exactly where the money is spent;
- The right to develop the land that is purchased or deed-restricted is permanently restricted;
- Controversies that might arise from the designation of receiving areas are avoided;

- A PDR program is easier to administer than a TDR program.

Disadvantages

- A PDR program requires the expenditure of funds, which are likely to be raised largely through public resources, and there is no offsetting increase in development density. As a result, there is a net loss to the community's tax base;
- PDRs involve the purchase of development rights, the recording of deed restrictions and the enforcement of easements where appropriate, all of which are characteristic administrative functions and costs associated with TDR programs.

To be successful, TDRs rely on market forces to obtain the desired outcomes. TDRs, and any alternative model, must relate to the underlying planning and land use goals, as well as assure that there is both a sufficient supply of and demand for development rights. The biggest problems from a market perspective arise if there is too little supply or too little demand.[1] If there are too few development rights (or none) available, then otherwise economically efficient development would not take place. If demand is too low, then land targeted for protection would remain vulnerable through lack of purchase of development rights.

All the models offered on the following pages implicitly assume there will be sufficient demand to create a functioning market. All of the models, except the first one, which is incentive-based, explore the rules under which development rights will be required as a condition of development. The assumption of adequate demand is one that needs to be empirically examined in any area where TDR or its alternatives are contemplated. Development trends vary substantially across Maine regions. There are also large variations related to the business cycle and interest rates. Both of these realities suggest that it would be difficult to create an effective statewide model. In addition, using TDRs to achieve conservation ends inevitably ties the progress of conservation, through these means, to these larger economic forces.

[1] If there are too many development rights on the market, the price will fall and fewer development rights will be offered. The supply will fall until an equilibrium price is reached. If demand is too high, the price of development rights will increase and make more development rights available. This assumes the rules of the TDR system permit supply to respond to price.

MODEL 1
DENSITY TRANSFER CHARGE
ALTERNATIVE TO TDR

Purpose

To acquire open space in rural or critical rural areas of a community (Maine's Community Planning & Land Use Regulation Act) with fees generated by allowing an increased density of development in another area of the community (designated growth area(s) identified in the community's zoning ordinance).

Where it could work

This program could work in a community with no village center that is seeking to create one, or in a community with an existing center or centers that provide opportunity for infill or expansion, and where:

1. There are valuable open space resources, such as active farmlands, wildlife resources, active timber harvesting, or other large undeveloped areas (critical rural areas);

2. There is growth pressure in the community and region;

3. There is local political support for increased density in the designated growth area(s) and a desire for a corresponding reduction of land available for development in designated rural or critical rural areas.

Example

How it could work

The community enacts an ordinance that identifies an overlay zone on the growth area, or some portion of it, where densities may be increased in exchange for the payment of a density transfer charge (DTC). The DTC would then be used to acquire (either directly or through leveraging other dollars) land, development rights, or easements in areas the community has designated rural or critical rural in its comprehensive, open space plan, etc. The DTC would be collected upon issuance of a building permit for a new dwelling unit that is made possible through approval of a subdivision plan within the overlay zone or zones. The amount of the charge and density credit would be calculated based on a methodology established in the ordinance. The methodology should reflect the cost of acquiring enough land, development rights, or easement (based on the community's choice of acquisition strategy) for the acreage required to support a dwelling unit in the rural area of the community. Credit is given for the density allowed on the property in the underlying zone and for qualifying open space that is set aside in the approved subdivision.

While a DTC is easier to design and implement than a TDR program, the difficulty comes in determining the appropriate and defensible charge for the area. The assistance of a land appraiser should be employed. The DTC may need to be adjusted periodically to reflect changes in market value (in a particularly hot real estate market, this could be as frequent as annually). The DTC is different from an open space impact fee, since it applies only to property that receives an increase in density from the community at the time of building permit approval. The difference in justification in turn leads to a difference in the justifiable amount of the charge. Since courts have upheld traditional TDR programs to date, the density transfer charge may provide an attractive alternative to an open space impact fee that requires a standard rational nexus approach.

TDR MODEL 2
SUBURBANIZING MAINE TOWN

Purpose

To preserve open space in one part of town (the sending area) by transferring development rights to another part of town (the receiving area).

Examples: **Suburbanizing Town TDR Model**

Where it could work

This TDR program could work in a small, suburbanizing town with no village center, a growing town with a village center, or in developing areas under the jurisdiction of the Land Use Regulation Commission, where:

1. There are valuable open space resources, such as active farmlands, valuable wildlife resources, or an active timber harvesting industry;
2. There is growth pressure because of the town's location within commuting distance of a major employment center, a new industry has located or emerged in the area, etc.
3. The town does not have a strong system of zoning and other land use controls to manage growth; and
4. There is local political support for shifting growth pressure away from open space resources to designated growth areas.

How it could work

The town enacts a minimum lot size requirement (for example, 5-10 acres) and adopts a Transfer of Development Rights (TDR) ordinance. The TDR ordinance allows land in one part of town (the receiving area in the example above) to be developed at a greater density than one dwelling per five acres (for example, one dwelling per two acres, or one dwelling per half acre in the village center) in exchange for the purchase of development rights on five acres of land in the sending area).

Variations to make it more effective

1. Require larger lot sizes without TDR (for example, 10-20 acres);
2. Require that land to be preserved through TDR purchase have a minimum amount of road frontage such as 300 feet on a public road;
3. Vary the amount of land to be preserved by TDR purchase, based on its development potential. For example, where there is developable public road frontage and/or soil types having high potential to support septic systems, require five acres; if there is little public road frontage and/or soil types have low potential to support septic systems, require 10 acres.

TDR MODEL 3
REGIONAL MULTI-JURISDICTIONAL TDR

Purpose

To preserve open space in suburban and outlying, rural areas of a region by shifting residential density through a TDR program from outlying areas towards the central city.

Where it could work

This TDR program could work in a region where there is a service center or centers, a growing suburban fringe, and a number of small, rural, outlying communities.

1. There would have to be at least one multi-jurisdictional agreement between a city and suburban or rural town, or between a suburban and rural town. Other towns could be added later.

2. There would have to be political support for increased density in the city (or in the suburb, if the agreement is between a suburban and a rural town).

3. There would have to be a demand for increased density in the city (or in the suburb, if the agreement is between a suburban and a rural town).

Example

How it could work

The city and the suburban or rural town enter into a joint agreement to transfer development rights, and subsequently adopt respective TDR ordinances. The agreement and the ordinances would state that TDRs can be purchased in the suburban or rural town in exchange for the right to build at a greater density (and/or at a greater building height) in the city. For example, in exchange for purchasing development rights on 10 acres of developable land in the suburban or rural town, the developer is entitled to increase his or her allowable floor area by 25% beyond the maximum density allowed in the zoning ordinance.

The suburban or rural town gains because sprawl is prevented on 10 acres of land that might otherwise be developed. The city gains additional development. The suburban or rural town gains because growth is directed to the city from outlying areas, where it generates commuter traffic and congestion.

Variations to make it more effective

1. Enact larger lot sizes in the suburban or rural town (for example, 10 acres);

2. Enact greater development incentives in the city (for example, a density bonus of 30% or more);

3. Designate receiving areas to reflect multiple centers and nodes of development, with particularly careful focus along arterials.

4. Purchase of TDRs in the suburban or rural town by a third party, such as a county, regional council, regional land trust, The Nature Conservancy, or the Land for Maine's Future Program

(LMF), with assistance from a variety of organizations that might include communities, land trusts, or conservation organizations. In essence, the Land for Maine's Future program or similar entity would serve as a TDR bank. This would create a market for TDR purchases from the suburban or rural town. Funds from the sale of the TDRs in the center or centers would cycle back to the LMF or similar program. In essence, LMF funds or similar funds could be reused for land preservation purposes. If successful, the same dollars could be used over and over again.

Note: While the LMF program can operate regionally and can match TDR funds with bond money, it does not currently own any property nor possess the administrative capacity and legal authority to manage a TDR program.

5. Adopt a multi-jurisdictional agreement to share public costs for infrastructure necessary to support the development and revenues generated from the development in desired areas. One challenge to such an agreement is determining how much town A, in which land is protected, should contribute to town B, which will see more development as a result of TDR.

TDR MODEL 4
PRESERVATION OF HIGHWAY CAPACITY

Purpose

To preserve the traffic carrying capacity of an arterial highway by ensuring that traffic from commercial development, when combined with through traffic, does not overwhelm the arterial.

Where it could work

Example

Preserving highway capacity through a TDR program could work along any arterial highway where there is the potential for future commercial growth, regardless of whether or not the arterial is currently experiencing commercial strip development or sprawl. This TDR model can be used to limit commercial growth to the traffic carrying capacity of the arterial.

How it could work

A community, or several communities working together, could adopt a TDR ordinance to limit traffic generated by commercial development along an arterial. For example, the traffic limits could be 20 peak-hour trips per acre of commercial land within a given depth of highway, such as the area within 1,000 feet of the highway. For any proposed development, the estimated number of peak-hour trips could be determined by a traffic impact analysis. The TDR ordinance would allow peak-hour limits to be transferred from one parcel to another, provided there is no net increase in the number of peak-hour trips allowed along the highway corridor. When the peak-hour trips reach the total assigned to the corridor, no additional commercial development would be permitted.

Variations to make it more effective

1. Transfer the development rights on one side of the street to the other to create a node that extends back from the arterial. If the community or communities prepare and adopt a street platting plan, a nonlinear node of development with an interconnected street network could be created.

2. The community (or several communities working together) could purchase some of the peak-hour TDRs. These could be held in reserve to ensure that peak-hour trips, when combined with through traffic, do not overwhelm the arterial.

3. A number of communities along an arterial could enact similar programs to ensure that commercial strip development does not simply shift farther down the road.

4. The Maine Department of Transportation (MDOT) or metropolitan planning organization (MPO) could develop a monetary incentive for preserving highway capacity through a TDR program. For example, MDOT could increase the State's or MPO's share of local highway improvement investment.

TDR MODEL 5
STATE MODEL – TRANSFER OF DEVELOPMENT CREDITS ALONG STATE HIGHWAYS

Purpose

To minimize the State's highway improvement costs resulting from commercial development along Maine's arterial and collector highways, and to slow or prevent commercial roadside sprawl.

Where it could work

This would be a statewide program that could apply to all arterial and major collector highways as defined by the Maine Department of Transportation, with the possible exception of urban downtowns.

How it could work

This is a variation of TDR that would require state enabling legislation. Since businesses benefit from their location on state highways, but also create traffic congestion, all new commercial development along the State's arterials and major collectors would require the purchase of development credits from a state land bank. For example, the development of 5,000 square feet of commercial or industrial space with access to Route 1 would require the purchase of one development credit from an appropriate state entity. A development ranging from 5,001 TO 10,000 square feet would require the purchase of two development credits. Proceeds from the sale of development credits could be used for the purchase of commercial development rights along undeveloped sections of arterial highways and major collectors in areas subject to commercial development pressure.

The price of a development credit would have to be high enough to support substantial right-of-development purchases. Downtowns should be exempted, but not major roads leading into them. For example, Water Street in Augusta would be exempt, but not Western Avenue.

Variations to make it more effective

1. Vary the price of the development credit, depending upon traffic and the severity of local highway deficiencies, existing development patterns, and regional and local land development pressures. Development credits should cost a lot more in developing suburban areas than in regional centers and rural, economically distressed areas of the state.

2. Boost the price of the development credit in state-identified "sprawl zones." These areas have not yet been identified, but could be defined by parameters such as the distance from urban centers. For example, Route 1 between the urban compact boundaries of Freeport and Brunswick might be a sprawl zone, as would Route 196 between Topsham and Lisbon.

3. Extend the program to cover non-commercial development, single-family homes and subdivisions.

4. Give priority to purchase of commercial development rights where funds from the sale of development credits will be combined with other dollars, or where complementary efforts will make the state purchase more effective (for example, funds from the sale of development credits could be used on a parcel adjacent to one already being preserved by the efforts of a local land trust).

5. Transfer the development rights to receiving areas that reinforce service centers and locally designated growth areas that are consistent with the Planning and Land Use Regulation Act. If the community or communities prepare and adopt a street platting plan, a nonlinear node of development with an interconnected street network could be created.

TDR AND AFFORDABLE HOUSING

The National Experience

Can TDR help create affordable housing? Based on a review of TDR programs in other states, there is only one known affordable housing TDR program, but there are no known TDR programs that preserve open space and create affordable housing.

In downtown Seattle, Washington, unused development rights on existing, low-income housing sites can be transferred to other downtown parcels through the purchase of TDRs, provided the units are brought up to code and are not subsequently converted to other uses. Seattle's program does not preserve open space. The program simply preserves low-income housing. The program has been successful because there is a market for the development rights, as developers have sought to build downtown at greater densities than are currently allowed in the zoning ordinance. The only way they can do that is to purchase unused development rights from the owners of low-income housing properties. The program is attractive to the owners of low-income housing properties who can sell TDRs and use a portion of the profits to upgrade their housing units. As of 2002, TDR has helped preserve 541 affordable housing units.

What is the Potential for Maine?

Despite a dearth of national examples, could TDR be used in Maine to preserve or create affordable housing? Could Maine become a national leader in the creative use of TDRs to promote affordable housing and possibly preserve land as well? With housing costs rapidly increasing, could TDR be an effective tool that cities and towns could use to address the problem? There is some potential in Maine to address affordable housing through TDR, but there are a number of challenges as well.

The potential. Given the right market conditions and local political support, it might be possible to preserve or create affordable housing through TDR. There are at least four possibilities:

1. Preservation of existing affordable housing. In downtown Portland or other central business districts, the community could enact a TDR program similar to Seattle's provided that there is a strong demand for development that exceeds local development limitations (density, building heights). Unused development rights from low-income housing units (if there are any) could be transferred to a proposed development site.

   This type of TDR program would not create affordable housing or preserve open space. However, it could be used to prevent the conversion of existing affordable housing to other uses. In order to be successful, there would have to be a sufficiently high demand for increased density or building height that developers would be willing to purchase unused development rights from owners of affordable housing sites. The development rights would have to be priced high enough to make it worthwhile for the owners of existing affordable housing units to sell them, rather than hold onto them and exercise the development rights at a later date, but not so high as to preclude their purchase by the development community.

   This approach is suitable for the development pressure and the low-income housing issue in the same general area. The Bayside neighborhood in Portland is one example where this might work. However, There may not be many areas in Maine where market conditions would support this technique.

2. Greater incentives for new affordable housing. In any community that enacts a TDR program, additional density beyond that permitted with a conventional TDR could be allowed if at least a portion of the housing units on the receiving site are affordable. For example, under a conventional TDR program, the purchase of one development right might allow two additional dwelling units to be built on the receiving site. Under an affordable housing TDR program, the purchase of one development might allow four additional dwelling units to be built, provided that one of the four units is an affordable housing unit.

   The keys to success with this scenario are setting realistic TDR prices that will be attractive to both buyers and sellers, and a local willingness to permit greater densities than would otherwise be allowable under current zoning regulations or a conventional TDR program.

3. Mandatory affordable housing TDR for large rural developments. For towns that are facing significant growth pressure in their rural areas, a mandatory TDR program could be enacted for large subdivisions (for example, 10 lots or more) as a way to better manage growth. Developers seeking subdivision approval on parcel A in a sending (or rural) area could be required to purchase TDRs from parcel B, also located in a sending or rural area) and be required to use the TDRs to build a specified number of affordable units on parcel C in a receiving (or growth) area.

   A mandatory affordable housing TDR program would be a mechanism towns could use to either discourage subdivisions in rural areas, or at least achieve some open space preservation, as well as the construction of some affordable housing units in their growth areas. This approach might work in fast growing towns, such as those in the Sebago Lake watershed, where a number of large-lot subdivisions (over 50 units) have been proposed or are on the drawing boards.

   This alternative is complicated and might have the effect of encouraging a number of small subdivisions scattered through town rather than a few large ones. In addition, a development that is priced high enough to encourage conservation of lands is likely to be too high to encourage affordable housing, and vice versa. It might be simpler to require that open space be preserved, and that a specified number of affordable housing units be built in a growth area.

4. Reuse of vacant mill buildings and sites with an affordable housing component. Allow density to be transferred from designated rural and critical rural areas of the community to the renovation, reuse, and adjacent site of a vacant mill building that is within a community's designated growth area when a certain percentage of the units are affordable. This strategy might work particularly well in a community like Windham that has an abandoned mill building (the Keddy Mill) in one of its traditional villages, South Windham-Little Falls that it shares with the Town of Gorham.

The Challenges. Using TDR to preserve open space and support affordable housing would be desirable because it would achieve two public purposes simultaneously. However, in addition to the limitations of traditional TDR programs outlined on page 3, there are several challenges relating specifically to affordable housing:

1. Affordable housing profit factor. On the face of it, few if any developers are likely to go to the trouble and expense of purchasing TDRs to build affordable housing unless in the end, there is enough profit. Incentives such as increased density may not lower costs sufficiently to justify the purchase of TDRs. However, there may be sites in a community's growth area (a waterfront location, for example) that would work if developers were able to build more high end housing (and thus increase their profits) in exchange for providing some affordable housing units.

2. Affordable housing alternatives. There may well be better ways to address the affordable housing problem. Some of these are contained in local comprehensive plans, some have already been implemented in local ordinances, and all are easier to understand and are less cumbersome than TDR. These include:

   a. Require that at least one in ten units in new developments be affordable;
   b. Reduce lot size and frontage requirements in growth areas;

c. Allow back-lot development;
d. Allow the conversion of single-family dwellings to multi-family dwellings;
e. Allow the creation of accessory apartments in existing dwellings;
f. Allow for elderly housing facilities, including congregate care facilities, in residential areas;
g. In growth areas, allow density bonuses for affordable housing;
h. Allow manufactured housing, including mobile homes, to be located in many areas of the community;
i. Allow mobile home parks in a variety of locations in the growth area of a community;
j. Provide information to the public about the range of federal and state housing assistance programs;
k. Examine local regulatory requirements from the standpoint of reducing requirements that add to development costs, such as excessive minimum lot sizes (especially for multi-family structures and/or in designated growth areas), pavement width, sidewalks in rural areas, and underground lighting; and
l. Create local committees and housing authorities for the purpose of creating low-income housing and/or recommending additional steps the community can take to support affordable housing.

APPENDIX - SUMMARY OF TDR PROGRAMS[1]
SUCCESSFUL NATIONAL PROGRAMS

Note: programs described in italics may be transferable to Maine

Montgomery County, Maryland

This is deemed to be the most successful program in the country. It is run by Montgomery County and applies to the unincorporated areas of the county.

Population:	873,341
Location:	Abuts Washington D.C. on the northwest
Type of Program:	County (regional)
Purpose:	Farmland preservation
Implementation:	40,583 acres preserved as of 2000
Program Summary:	In 1980, the Montgomery County Council adopted a functional master plan that identified an Agricultural Reserve, consisting of more than a third of the County's land area, where farmland and agriculture were to be preserved. To implement the program the County zoned 91,591 acres to a Rural Density Transfer Zone. The lot size requirement was increased from 5 to 25 acres/dwelling unit, with a provision that TDRs could be transferred to receiving areas at a rate of 1 TDR/5 acres. Over the years, the County identified, through its zoning ordinance, receiving areas in 14 communities. Within each receiving area, the County identified a lower base line density, and a higher TDR density. TDRs can be sold at different times from a sending site, and are recorded as an easement. The County tracks each TDR by an assigned serial number. TDRs are typically purchased under option contracts. The County created a TDR bank as a last resort buyer, but this was never used and was eliminated in 1990.
Comments:	Developers of receiving sites have found it more profitable to buy development rights than to acquire more land for their projects. Incorporated municipalities have not participated in this program, resulting in receiving area densities that are higher than would be the case if they were located in cities. This program is not directly transferable to Maine because it relies on a strong county government that has jurisdiction over unincorporated places.

[1] Based on information contained in Beyond Takings and Givings, Rick Pruetz, AICP, Arje Press, Marina Del Rey, California, 2003

New Jersey Pinelands

In terms of acres preserved, this program is deemed to be the second most successful program in the nation.

Population: -
Location: Southeastern quarter of New Jersey
Type of Program: Regional
Purpose: Environmental protection/farmland preservation
Implementation: 31,400 acres preserved as of August, 2001
Program Summary: In 1978, Congress designated the New Jersey Pinelands as the country's first national reserve. In 1980, New Jersey created the Pinelands Commission, a regional agency that includes 7 counties and 53 localities. The Commission adopted the Comprehensive Pinelands Management Plan for the one-million-acre planning area. The Plan creates an inner Preservation Area of 368,000 acres containing environmentally sensitive areas. The Plan allows four dwelling units to be built in growth areas for every Pineland Development Credit (PDC) transferred from a preservation area. In the Preservation Area District, one PDC/39 acres is granted for upland areas; 0.2 PDCs are granted for wetlands, and two PDCs/39 acres are granted of land approved for mining and not yet disturbed. The Plan requires 23 jurisdictions to provide receiving areas from any of the 60 jurisdictions in the sending area. The extra density bonus allowed by PDC varies by municipality. In 1987, New Jersey established the New Jersey Pinelands Development Credit Bank and capitalized it with $5 million in general fund money. In 2000, the bank was authorized to buy 100 PDCs for $5,562.50 per right.
Comments: This program is second only to Montgomery County in terms of acres preserve, but it's far from reaching its goal. Again, it's not directly transferable to Maine unless Maine creates a similar Commission.

Calvert County, Maryland

This program is considered to be one of the most successful in the nation.

Population: *74,563*
Location: *25 miles southwest of Washington, D.C.*
Type of Program: *Regional (County)*
Purpose: *Farmland preservation*
Implementation: *8,900 acres preserved as of January, 2001*
Program Summary: *Sending sites are in the Agricultural Preservation District. The County's regular agricultural zone allows an average of one dwelling unit per 10 acres. Owners of farmland can request to be rezoned to the Agricultural*

Preservation District, in which case the lot size is 25 acres, and TDRs can be created at a rate of one dwelling per five acres. Land owners can sell development rights for use in the Rural Community District. In the Rural Community District, the lot size requirement is one dwelling per ten acres without TDR. With a TDR, the density is allowed to increase to one dwelling per two acres (even higher densities in areas closer to town centers).

Comment: *This program works because many farmers want to continue farming, and it's cheaper for a developer to buy development rights than it is to buy land. In Calvert County, TDRs are valued at $2,600 per acre, while raw land values are about twice that amount. Because of the relatively large lot sizes involved, this program may have some applicability to Maine.*

Boulder County, Colorado

This rural preservation program was the first to allow transfers between municipalities.

Population: 291,288

Location: The County begins 15 miles northwest of Denver

Type of Program: Regional

Purpose: Rural character preservation

Implementation: Between 3,200 and 4,700 acres preserved, depending on whether sending sites retain their water rights

Program Summary: Beginning in the mid 1990's Boulder County entered into agreements with the City of Boulder and seven other jurisdictions under which TDRs can be transferred from sending sites in the County to receiving areas in or near the City of Boulder and the seven communities. This program was used on 15 transfers as of the end of 2000. The size of the developments in the receiving areas ranged from four units to over 50 units, and collectively accounted for 265 units on 470 acres of land. The average lot size in the receiving areas ranged from 0.5 acres to 1.9 acres. The average TDR price was $50,000.

Comments: A good example of regional cooperation, but again, not directly transferable to Maine because it's a county program in a part of the country where there are incorporated and non-incorporated areas.

Cupertino, California

This is an example of a community using TDR to preserve highway capacity

Population:	*50,546*
Location:	*Five miles west of San Jose, California*
Type of Program:	*Local*
Purpose:	*Infrastructure capacity preservation*
Implementation:	*After 30 or more transfers, the development capacity of the road has been reached*
Program Summary:	*In 1973, Cupertino adopted development limits within the Stevens Creek commercial corridor to ensure that traffic would not overwhelm the street system. The development limits were 16 one-way, peak-hour trips per acre of commercial land. The City allowed TDRs to be transferred between sites on a one-to-one basis that did not increase the total number of trips within the corridor. TDRs could be bought by anyone, and held for any length of time before being used on a receiving site. After 20 years and 30 or more transfers, the corridor has reached its development capacity.*
Comments:	*This is a very innovative approach to traffic management that could be used in Maine, particularly in areas undergoing strip commercial development. The Cupertino program is no longer in existence.*

Dade County, Florida

Population:	1.9 million
Location:	Southeastern corner of the Florida Peninsula
Type of Program:	Local
Purpose:	Environmental protection/wetlands preservation
Implementation:	Between 1,065 and 8,520 acres preserved (some land is already owned by public agencies)
Program Summary:	In 1981, Dade County adopted a TDR program to preserve sensitive lands in the Florida Everglades. Landowners can sell Severable Use Rights (SUR) at rates that range from one SUV per five acres in areas that are easiest to develop, to one SUR per 40 acres in areas that are difficult to develop. The County offers a range of density bonuses to projects in 18 different receiving areas. SURs can be used to deviate from density, lot area, frontage and other development requirements on residential and commercial receiving sites. Use of SURs is approved administratively.
Comments:	Lack of adequate record keeping makes it difficult to evaluate the success of this program.

Long Island Pine Barrens, New York

This program is a regional program aimed at managing a 100,000 acre area in the center of Suffolk County

Population:	1,321,339
Location:	Eastern end of Long Island
Type of Program:	Regional
Purpose:	Environmental protection/groundwater protection
Implementation:	315 acres preserved
Program Summary:	In 1993, the New York Legislature created the Pine Barrens Joint Planning and Policy Commission, composed of representatives from the State, Suffolk County and three localities, to develop a plan for the protection of the Pine Barrens that could include TDRs. The Plan divided the Barrens into two areas; a 52,500 acre Core Preservation area, in which residential growth is prohibited, and a 48,500 acres Compatible Growth area, which allows some development. The State of New York provided $5 million to start a Clearinghouse to buy and sell Pine Barrens Credits (PBCs). The value of PBCs varies depending on the prior, underlying zoning and the extent of on-site development. The Clearinghouse distributes information to the public and buys PBCs when necessary. The Clearinghouse has a staff of five.
Comments:	Considering the number of acres preserved, this program has very high administrative overhead costs.

Malibu Coastal Zone, California

Population:	-
Location:	The Malibu Coastal Zone stretches along 27 miles of coastal shoreline between Los Angeles and Ventura County. It also extends 5 miles inland.
Type of Program:	Regional
Purpose:	Environmental protection/infrastructure capacity protection
Acres Preserved:	924 substandard lots retired, which collectively account for about 800 acres
Program Summary:	In 1979, the California Coastal Commission adopted guidelines for creation of a Transfer of Development Credits (TDC) program designed to retire almost 5,000 substandard lots (e.g. 4,000 – 7,000 square feet) in the Santa Monica Mountains. A new lot cannot be developed in the receiving area, near the Pacific Ocean, unless an existing substandard lot in the mountains is permanently restricted from development by deed restrictions. The program is considered voluntary because site owners are not prevented from developing their lots, nor are they required to sell development rights from their substandard lots. A land trust has been active in helping people sell their TDCs.
Comments:	This program has met 20% of its goal. It might be useful in some Maine towns with substandard lots.

Morgan Hill, California

Population: 33,556
Location: 20 miles southeast of San Jose
Type of Program: local
Purpose: Environmental protection: hillside preservation
Implementation: 211.5 acres preserved (out of a total of 250 above 500 feet elevation) including 43 city-purchased acres
Program Summary: El Toro Mountain is the City's most prominent landmark. The City's general plan calls for preserving land above the 500 foot elevation line on the mountain. The City adopted a Hillside Combining District which allows development credits to be transferred to receiving sites. One incentive to purchase Transferable Development Credits (TDCs) is to achieve up to a 10% density increase on a receiving site. Another is to meet the requirements of the City's Residential Control System process, under which there is a limit of 250 building permits per year (TDCs help meet the open space requirements of the development application process). Over the years, TDCs have sold for prices ranging from $25,000 to $75,000.
Comment: This approach might be considered for Mount Agamenticus in York/South Berwick.

New York, New York

Population: -
Type of Program: local
Purpose: Historic preservation
Implementation: 12 historic landmarks preserved; 660,000 square feet of development rights transferred in the Seaport Subdistrict; 448,000 square feet of development rights transferred in the Grand Central Station Subdistrict
Program Summary: The City's historic landmarks program, established in 1968, allows landmark owners to sell their unused floor area (the difference between the floor area of the landmark and the maximum floor area allowed by zoning). There is a separate zoning lot merger process which has been used more frequently to build at higher densities. There is a separate TDR program for the South Street Seaport area under which a preservation area was created, and development rights from this area were allowed to be transferred to an adjacent area designated for redevelopment. Financial institutions agreed to write off delinquent loans on buildings in the preservation area in return for development rights. These development rights were held in a TDR bank and were used to promote the construction of office buildings in the redevelopment area.
Comment: These TDR programs have worked because there is a strong demand for more density than the City's zoning will allow.

Seattle, Washington

Population: 563,374
Type of Program: local
Purpose: Downtown revitalization, affordable housing in the downtown
Implementation: Preservation of 321 affordable housing units; City profit of $300,000 by buying TDRs from seven affordable housing projects with 359 units (there are a total of 7,311 low-income units in the downtown)
Program Summary: The City enacted a TDR program in 1985 for downtown revitalization. Unused development rights can be transferred from low-income housing units (as long as the units are brought into compliance with housing and building codes) as well as designated landmarks (provided the landmark is rehabilitated), to two office zoning districts. The City created a TDR bank to facilitate transfers and funded it with a $1.2 million appropriation. The landmark program has been hampered by procedural requirements, but the low-income preservation program has been successful. TDRs from 321 units of low-income housing have been transferred to office projects. The TDR bank purchased TDRs from seven affordable housing projects with 359 units for $1.9 million and sold them to developers for $2.2 million.
Comment: This is one of the few TDR programs with an affordable housing component.

Tahoe Regional Planning Agency

Population: -
Location: Tahoe Basin, which includes two counties in California and three in Nevada
Type of Program: Regional
Purpose: Environmental/water quality preservation
Implementation: 1.2 million square feet of previously covered land has been restored to its natural condition. The Land Coverage Bank has also transferred coverage and other marketable rights to more than 215 receiving area sites.
Program Summary: The Tahoe Regional Planning Agency was created by California and Nevada in 1969 to protect the unique ecology of the Lake Tahoe basin in general and the clarity of Lake Tahoe in particular. The Agency's 1987 zoning ordinance severely restricts development on highly sensitive lands. Strict land coverage limits vary according to the limitations of each site. Property owners can sell their land coverage rights for use on appropriate receiving sites in the same hydrologic region. The program uses a one-to-one transfer ratio. The amount of coverage available for transfer equals the amount of coverage precluded from the sending site. The Agency handles an estimated 25-35 land coverage transfers per year. The Agency also limits the amount of development that can occur in the basin every year (e.g. 300 additional dwelling units), and allocates the allowable development to various communities in the basin. Allocations can also be transferred by TDR from

a sending site to a receiving site. In addition, the demolition of a structure in a highly sensitive area creates a development right that can be transferred to a receiving area.

Comment: Not directly transferable to Maine. The Suitum case, discussed in a separate paper, resulted from this TDR system.

OTHER, LESS SUCCESSFUL TDR PROGRAMS

Eden, New York

Population: 3,579
Location: Western New York State, 20 miles south of Buffalo
Type of Program: Local
Purpose: Environmental/farmland preservation
Implementation: Only six transfers for relatively small projects
Program Summary: Eden has a TDR program which allows TDRs to be transferred from the Conservation Zone (5 acre lot size requirement) and the Agricultural Zone (4 acre lot size requirement) to one of three residential zones. Density in the three residential receiving zones can be increased anywhere from 33% to 50%. The Town encouraged compact development in the residential zones by creating a sewer district.
Comment: The program hasn't been successful because there is little development pressure, and the people moving to Eden want large lots and are willing to pay for them.

Falmouth, Massachusetts

Population: 32,660
Location: Southwest corner of Cape Cod
Type of Program: Local
Purpose: Environmental/farmland preservation
Implementation: Used only three times; preserved 15-20 acres including nine acres near the town's primary drinking water source
Program Summary: Under Falmouth's TDR program, sending areas include land within Water Resource Protection and Coastal Pond Overlay districts. Receiving sites must be at least 2 to 10 acres, depending upon the district. The density bonus varies by district.
Comment: -

Groton, Massachusetts

Population:	*9,547*
Location:	*30 miles northwest of Boston*
Type of Program:	*Local*
Purpose:	*Environmental/farmland preservation*
Implementation:	*Since 1988, 50 to 100 sending sites have been preserved, resulting in the preservation of a few hundred acres of land, including farmland, properties important to the Town's water supply, and a greenway along the Nashua River. TDRs have been used to accelerate the pace of development, rather than increase density.*
***Program Summary**:*	*TDR is available in the Residential-Agricultural (R-A) District, which applies to 90% of the Town. The R-A lot size requirement is 80,000 square feet. TDRs can be used to increase density by 25%, but only in the R-A. Prior to 1988, there were no TDR transfers. In 1988, Groton added Develop Rate Limitation provisions (a building cap) to its zoning ordinance. With TDR, a developer can double from six to 12 the number units permitted per subdivision by purchasing the development rights to one 80,000 square foot parcel.*
***Comment**:*	*This has potential for Maine communities with growth caps.*

South Burlington, Vermont

Population:	*15,814*
Location:	*Three miles southeast of Burlington*
Type of Program:	*Local*
Purpose:	*Environmental/farmland preservation*
Implementation:	*50 development rights have been transferred to a 221 unit development project, resulting in the preservation of a 45-acre hayfield*
***Program Summary**:*	*In 1992, the City enacted the Southeast Quadrant District which encourages clustering and allows TDRs to be transferred from restricted to development areas. On pre-existing lots, the ordinance allows one dwelling but prohibits the creation of additional lots. However, development rights can be transferred at a rate of 1.2 dwelling units per acre. With TDR, owners of receiving sites can increase base density from 1.2 units per acre to 4 units per acre, resulting in a density bonus of 233%.*
***Comment**:*	*This may have potential for sewered Maine communities struggling to direct growth to growth areas.*

Windsor, Connecticut

Population:	*28,000*
Location:	*west bank of the Connecticut River, seven miles north of Hartford*
Type of Program:	*Local*
Purpose:	*Flexibility*
Implementation:	*The residential TDR program has had no transfers, but 13 acres of open space have been preserved under the non-residential TDR program*
Program Summary*:*	*The purpose of the non-residential TDR program is to preserve land with historic, ecological, aesthetic, agricultural or recreational resources. Applicants can propose transfers of coverage between parcels in any non-residential zones. Following a transfer, the sending site must be dedicated to the Town or another public or quasi public entity acceptable to the Town. The amount of coverage transferred cannot exceed 50% of the total area of the sending site; the transferred coverage plus the original coverage on the receiving site cannot exceed 67% of the receiving parcel. Under this program, the town has received a 4.5 acre site along the Connecticut River that the town will use for future walking trails and recreation. The town also received a 3.5 acre site near an arterial which will be used as a park, , as well as a 1.7 acre site and a 3.2 acre site that will be used for future mass transit between the City of Hartford and Bradley International Airport.*
Comment*:*	*A program like this may not stop sprawl, but it would help a Maine community provide open space or public facility amenities it could not otherwise afford.*

Brunswick, Maine

Population:	20,906
Location:	Midway between Portland and Augusta
Type of Program:	Local
Purpose:	Environmental
Implementation:	The TDR program was never used. Brunswick eliminated the TDR ordinance provisions when a new ordinance was adopted in 1997.
Program Summary:	Under this program, sending sites could be located in any district, provided they were in one of five categories: land within the natural resources overlay zone; land important for water quality protection; land with unique historical or natural resources; land furthering the objectives of the Conservation Commission; or land furthering the objectives of the Recreation Commission. Receiving sites had to be in the 250-acre Mixed Use Zone II. For residential projects TDR could be used to increase building footprints from 25% to 50%; impervious surface could be increased from 40% to 70%, and residential density could be increased

from 80,000 square feet per unit to 5,000 square feet per unit. For commercial and industrial projects, the building footprints could be doubled and the lot coverage could increase from 40% top 70%.

Comment: According to the former town planner, TDRs were not used because developers were satisfied with the density they could get without using TDRs.

Cape Elizabeth, Maine

Population: 8,854
Location: 7 miles south of Portland, Maine
Type of Program: Local
Purpose: Environmental/farmland preservation
Implementation: As of May, 2001, no transfers had occurred
Program Summary: This program has been in effect since 1982. A sending site is any land in the Residence A (RA) district that meets one of four criteria: 1) the land is used for agriculture; 2) the Town's visual analysis has identified the land as being of scenic value; 3) the land has identified historic or archaeological significance; or 4) the land is used for forestry and is located within 250 feet of a public road. Beginning in 1997, a receiving site can be located in the RA district. The RA district has a lot size requirement of 80,000 square feet for individual dwellings, and 66,000 square feet in subdivisions that comply with the open space zoning provisions. TDRs can be sent at the rate of one unit per 64,000 square feet.
Comment: The density bonus with TDR is relatively modest. In three separate referendums, the voters determined that the sewer system should remain growth-neutral.